A

CIMB ISLAMIC BANK BHD v. KHAIRUDDIN ABU HASSAN

COURT OF APPEAL, PUTRAJAYA
LAU BEE LAN JCA
ABU BAKAR JAIS JCA
GUNALAN MUNIANDY JCA

B

[CIVIL APPEAL NO: W-02(NCVC)(W)-850-04-2018]
3 FEBRUARY 2021

C

BANKING: *Facility – Default – Bank granted facility to borrower – Borrower defaulted in instalment payments – Bank terminated financing and auctioned property – Borrower commenced action against bank premised on contract and tort – Allegation that bank failed to provide notice of proclamation of sale and did not sell property at proper price – Whether bank obliged to notify borrower about proclamation of sale – Whether bank's valuation report could be used for auction – Whether borrower could maintain case since bidders have been given vacant possession*

D

CONTRACT: *Agreement – Banking agreement – Breach of – Bank granted facility to borrower – Default in instalment payments – Bank terminated financing and auctioned property – Borrower commenced action against bank premised on breach of contract – Allegation that bank failed to provide notice of proclamation of sale and did not sell property at proper price – Whether bank had duty to notify borrower about proclamation – Whether bank breached contractual obligation to borrower*

E

TORT: *Negligence – Duty of care – Banker-customer – Bank granted facility to borrower – Borrower defaulted in instalment payments – Bank terminated financing and auctioned property – Borrower commenced action against bank premised on tort – Allegation that bank failed to provide notice of proclamation of sale and did not sell property at proper price – Whether bank had duty of care under tort to notify borrower about proclamation*

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The appellant had provided a banking facility to the respondent for the purchase of a property. For the financing, the respondent assigned the property to the appellant. The respondent, however, defaulted in the instalment payments for the facility, prompting the appellant to terminate the financing and to demand for the sums due of more than RM1 million. The appellant then auctioned the property and sold it off at the reserve price of RM2.1 million. The respondent commenced an action against the appellant at the High Court, premised on contract and tort, for the appellant's alleged failure to provide notice of the proclamation of sale ('proclamation') ('notice') and not selling the property at the proper price. The respondent also sued, *inter alia*, the successful bidders but later entered into a consent judgment with them where the respondent agreed to deliver vacant possession and costs to the bidders. The High Court Judge ('trial judge')

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I

decided in favour of the respondent and ordered the appellant to pay RM1.4 million to the former on the grounds that (i) there were breaches of contract and duty of care in tort by the appellant for failing to serve the notice to the respondent before the auction date; (ii) the advertisement of the proclamation in the Malay Mail was insufficient as the newspaper was not published in the States of Perlis, Terengganu, Sabah and Sarawak; (iii) the postal notification by the appellant for the proclamation would have reached the respondent only after the date of auction; (iv) based on the valuation by the respondent's valuer, the true value of the property should be RM3.5 million, not RM2.1 million. Therefore, the appellant must pay the respondent the difference of RM1.4 million; (v) the appellant had wrongly used the valuation report done for CIMB Bank Bhd and not the appellant's own valuation for CIMB Islamic Bank Bhd; (vi) the appellant's valuation failed to note the property was on commercial land and not residential land; and (vii) there was no need for the respondent to set aside the auction already completed before suing for damages against the appellant. Hence, the present appeal. In support of the appeal, the appellant argued that: (i) there was no fair trial as the trial judge frequently and unnecessarily interrupted, intimidated and threatened the appellant's witnesses; and (ii) there was no obligation on the appellant to notify the respondent of the proclamation. The notice was actually left in the respondent's letter box at the property and at the property's management office. The respondent raised preliminary objection against the appellant's appeal and argued that the appellant was procedurally late by more than two months in filing the additional record of appeal incorporating the trial judge's grounds of judgment. The respondent further argued, *inter alia*, that: (i) the letters attempting to notify him of the proclamation were not consistent with specific provisions of the property purchase agreement; (ii) the valuation report was not commissioned by the appellant but by CIMB Bank Bhd and the appellant's valuer did not visit the property to prepare the valuation report; and (iii) the respondent could sue the appellant despite not seeking an order to declare the auction invalid and there was no need to set aside the auction that has been completed with the purchase of the property by the bidders. The issues that arose for determination were, among others, (i) whether the respondent's preliminary objection should be allowed; (ii) whether the trial judge descended into the arena; (iii) whether the appellant must notify the respondent about the proclamation; (iv) whether the letters sent by the appellant, notifying the respondent about the proclamation, were relevant in view of the terms in the property documents; (v) whether specific provisions of the property purchase agreement applied to the respondent in respect of the auction; (vi) whether the appellant's valuation report could be used for the auction; and (vii) whether the respondent could still maintain the case since the bidders have been given vacant possession.

Held (allowing appeal; setting aside decision of High Court)
Per Abu Bakar Jais JCA delivering the judgment of the court:

(1) The preliminary objection should be dismissed and the motion should be allowed. In its affidavit supporting the motion, the appellant affirmed that they had to study the lengthy grounds of judgment of the trial judge in order to decide whether to amend the memorandum of appeal. The respondent would not, in any manner, be prejudiced by the filing of the additional record of appeal. The grounds of judgment of the trial judge, after all, was served on the respondent by this additional record of appeal well before the hearing of the appeal. Therefore, the respondent had more than sufficient time to prepare for the appeal. (paras 51 & 53)

(2) The trial judge had not been partial throughout the course of the trial. The questions posed and the statements made by the trial judge during the trial did not at all indicate that she had taken a stand favouring the respondent even before giving the decision. It could not be said that she had conducted the trial with the intention to unnecessarily hinder and frustrate the appellant in presenting its case before the court. Asking the appellant's witness, as pointed out by the appellant, as to whether he was having a problem with hearing could not be equated to the trial judge being partial towards respondent. The trial judge's mannerism and choice of words could have been better phrased but she certainly could not be accused of not being objective by asking the witness this question. Similarly, it was not correct for the appellant to argue that the trial judge had threatened its witnesses when she told the witness that she could end up in lock up for referring to, without permission from the court, a document not in the bundle of documents. When the trial judge said so to the witness, she was merely reminding the witness how serious the court viewed that reference to the document without first seeking permission from the court. (paras 55-56)

(3) The documents pertaining to the property, *ie*, the property purchase agreement, the property sale agreement, the deed of assignment and the power of attorney, showed that the respondent willingly agreed to hand over the property to the appellant for sale by public auction. The terms of the documents clearly did not provide for the notification of the intended auction to the respondent. Consequently, there was no duty on the appellant to notify the respondent about the proclamation. The respondent, as someone who needed the facility then, chose to ignore or failed to appreciate the repercussions of his agreements on the terms of the documents. He must be bound by his agreement. Furthermore, the property was absolutely assigned to the appellant. This meant that the appellant had absolute discretion in dealing with the property as it deemed necessary. The property basically belonged to the appellant until full payment was made by the respondent for the facility he had

obtained from the former. In fact, because of the absolute assignment, there was absolutely no requirement for the appellant to notify the respondent regarding the proclamation. The appellant had no duty of care under tort to the respondent to notify him of the proclamation. The appellant could not be found negligent, had not acted *mala fide*, had not committed fraud and could not be said to have breached its contractual obligation to the respondent. Therefore, it did not matter whether there was correspondence sent to notify the respondent about the proclamation. At best, the letters sent were extra or additional service provided at the courtesy of the appellant as a bank to the respondent being its customer. It was sent beyond the duty imposed on the appellant. The advertisement of the proclamation in the Malay Mail, which was not circulated in several States, counted for nothing. (paras 62, 63, 66, 67, 68 & 81)

(4) The specific provisions in the property purchase agreement could only be argued if there was a duty to inform the respondent regarding the proclamation. Since there was absolutely no obligation for the appellant to so notify the respondent, those provisions could not override the provisions in property sale agreement, the deed of assignment and the power of attorney. (para 75)

(5) The respondent's contention, that the report was not commissioned by the appellant but by CIMB Bank Bhd, was too trivial as it sought to differentiate essentially the same banking organisation. Strictly speaking, these were two different entities. However, in terms of business prudence and efficient management of resources, the instruction for the valuation report could come from the appellant or CIMB Bank Bhd, both being in the same banking group. The allegation by the respondent, that the appellant's valuer did not visit the property to prepare the valuation report, could not render the report worthless or unworthy of reference. In evaluating a property for the purpose of auction, it was not necessary to always visit the property. What was acceptable in practice of property valuers was to make comparison with sales around the vicinity of the property. This could be done by not visiting the property but getting the correct information from such sales of other properties. The trial judge erred in accepting the respondent's valuation report as it was not prepared for foreclosure proceedings and could not be used for the sale of the property by auction. (paras 82, 83 & 92)

(6) The respondent settled the suit with the bidders by entering into a consent judgment with the latter. In this consent judgment, the respondent agreed to give vacant possession of the property to the bidders. That essentially meant that the auction was accepted by the respondent to be lawful. Otherwise, the respondent would not have agreed to give vacant possession of the property to the bidders. Since the

respondent accepted that the auction was proper and valid, he should not continue the suit against the appellant. He should not be allowed to approbate and reprobate. (paras 93 & 94)

Case(s) referred to:

Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109 HC ***(refd)***

Damai Freight (M) Sdn Bhd v. Affin Bank Bhd [2015] 4 CLJ 1 FC ***(refd)***

Deutsche Bank (Malaysia) Bhd v. MBf Holdings Bhd & Anor [2015] 8 CLJ 1068 FC ***(refd)***

Hong Yik Plastics (M) Sdn Bhd v. Ho Shen Lee (M) Sdn Bhd & Anor [2020] 4 CLJ 479 CA ***(refd)***

Jitender Singh Pagar Singh & Ors v. Pentadbir Tanah Wilayah Persekutuan & Another Appeal [2012] 2 CLJ 165 CA ***(refd)***

Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd v. Liew Choong Kin [2018] 6 CLJ 217 CA ***(refd)***

Malayan Banking Bhd v. Lim Poh Ho & Anor [1997] 2 CLJ 516 CA ***(refd)***

Ng Bak Soon & Ors v. Ji Seng Hong Plastic Manufacturing Sdn Bhd; Mustapha Mohamed (Receiver & Manager And Applicant) [2015] 2 CLJ 828 HC ***(refd)***

Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***

Public Bank Bhd v. Kemajuan Flora Sdn Bhd & Anor [2001] 1 LNS 330 HC ***(refd)***

Rahbar Yadollah Fathi v. PP [2020] 1 LNS 99 CA ***(refd)***

Ruzain Zainudin & Anor v. RHB Bank Bhd [2011] 1 LNS 1196 HC ***(refd)***

Seema Jaya Sdn Bhd & Anor v. CIMB Bank Bhd [2015] 8 CLJ 1047 HC ***(refd)***

Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd [1985] 2 All ER 947 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

For the appellant - Jeyanthini Kannateran & Pauline Koh; M/s Shearn Delamore & Co

For the respondent - Ashok Athimulan, Muniandy Vestanathan & Fiona Aurelia Culas; M/s Andy & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-289-06-2015 (overruled).]

Reported by Najib Tamby

JUDGMENT

Abu Bakar Jais JCA:

Introduction

[1] The appellant provided a banking facility to the respondent for the latter to buy a penthouse. The respondent defaulted in payments for the facility. The appellant did not sue. Instead, the respondent sued the appellant. The respondent sued the appellant because of alleged wrongful acts of the appellant in auctioning that penthouse after default by the respondent on the installment payments.

[2] The High Court gave judgment for the respondent. The appellant is before us in the appeal against that decision of the High Court. The respondent raised a preliminary objection and also argued several points in the substantive appeal itself.

[3] Among others, the dispute involved questions whether in the circumstances of this case, the proclamation of sale for the public auction must be legally notified or served to the respondent and whether legally, the appellant's valuation report prepared could be used as a guide in arriving at the appropriate price of the penthouse for the purposes of the said auction.

Background Facts

[4] The appellant provided the Islamic banking facility ("the financing") to the respondent to buy a penthouse at Mount Kiara, Kuala Lumpur ("the property") pursuant to the property purchase agreement and property sale agreement (collectively called the "agreements" unless otherwise indicated) executed between both parties. For the financing, the respondent assigned the property to the appellant as reflected in a deed ("deed of assignment") and also provided a power of attorney ("PA") for the same. The arrangement for the financing is commonly known as loan agreement cum assignment ("LACA")

[5] The financing was terminated and cancelled by the appellant on the basis that the respondent defaulted in the installment payments for the facility. The appellants then solicitors sent the demand letter seeking outstanding payments. The letters were sent to two last known addresses of the respondent. The first is at the property, admitted to be the place of residence of the respondent and the second, at Subang Jaya as stated in the documents for the financing.

[6] As consequence of non-payments for the facility, the appellant sent letters dated 9 May 2014 and 30 May 2014 seeking the entire sum due of more than RM1 million from the respondent. Subsequently, the agreements were terminated as the payment requested was not met.

[7] There was a further event of default as the respondent was declared a bankrupt on 14 May 2014. This was later annulled on 10 April 2015.

[8] The appellant then arranged for a valuation report of the property and took steps to auction the same. The proclamation of sale ("proclamation") for the public auction was advertised in a local newspaper, the Malay Mail and a copy was left at the respondent's letter box at the property. A copy was also given to the officer at the management office of the property for it to be handed to the respondent.

[9] The public auction thereafter proceeded on 10 January 2015 and the property was sold at the reserve price of RM2.1 million to two bidders at the auction.

[10] Some five months later, the respondent sued the appellant at the High Court (the basis for the present appeal) for contract and tort for alleged failure of the appellant to essentially provide notice of the proclamation and not selling the property at the proper price. Also sued in the same action were the auctioneer, appellant's solicitors and the two successful bidders at the auction. Except for the appellant, the suit was withdrawn against the auctioneer and the appellant's solicitors. Consent judgment was also entered with the two bidders where the respondent agreed to deliver vacant possession and costs to the two bidders.

[11] The High Court proceeded with the suit against the appellant and decided for the respondent and ordered the appellant to pay RM1.4 million with interest to the former and also costs.

Summary Of The High Court's Decision

[12] The High Court decided there were breaches of contract and duty of care in tort by the appellant for failing to serve the notice of the proclamation for the auction to the respondent before the auction date. The advertisement of the proclamation in the Malay Mail was insufficient as the newspaper was not published in the States of Perlis, Terengganu, Sabah and Sarawak. Further, the postal notification by the appellant for the proclamation would have reached the respondent only after the date of auction.

[13] The true value of the property should be RM3.5 million as valued by the respondent's valuer and not RM2.1 million which was the price of the property sold at the auction. Thus the appellant must pay the respondent the difference of RM1.4 million. The appellant had also wrongly used the valuation report done for CIMB Bank Bhd and not the appellant's own valuation, for CIMB Islamic Bank Bhd. The appellant's valuation had also failed to note the property is on commercial land and not residential land. And the appellant's valuer admitted a mistake by not taking note of comparable sales in the valuation report.

[14] There is no need for the respondent to set aside the auction already completed before suing for damages against the appellant.

[15] The appellant's witness, although testifying that the appellant instructed letters to be sent to the respondent, was not credible in respect of these letters sent as the same were not copied to the appellant but to CIMB Bank Bhd.

Summary Of The Appellant's Contentions

[16] For the present appeal the appellant argued there was no fair trial as the learned trial judge at the High Court had frequently and unnecessarily interrupted, intimidated and even threatened the appellant's witnesses.

[17] Further, the learned trial judge was being petty and unreasonable in requiring to see original documents though these documents were already agreed to be put in Part "B" of the bundle of documents. The learned trial judge even required a security guard, who was a witness for the appellant to show his work permit.

[18] The learned trial judge was wrong when she was not satisfied whether the auction was proper as the correspondence and witnesses had referred to CIMB Bank Bhd and not the appellant. She was therefore wrong to conclude that the appellant's valuation report was CIMB Bank Bhd's report and not the appellant's report. The learned trial judge failed to appreciate the evidence that all secured collections were being handled by the same centre for both CIMB Bank Bhd and the appellant.

[19] The learned trial judge although having found the respondent to be not credible, failed to appreciate that the respondent had lied in saying he did not know of the proclamation in his post box and in the management office for delivery to him. The learned trial judge failed to appreciate also that the demand letter was sent to the addresses provided by the respondent to the appellant.

[20] There was judicial misapplication and failure to fully appreciate the evidence by the learned trial judge by not acknowledging that the oral evidence given by the respondent was contradictory to the documentary evidence.

[21] Besides, there is no obligation on the appellant to notify the respondent of the proclamation. The learned trial judge failed to appreciate this by not looking at and noting the provisions of the agreements, deed of assignment and the PA.

[22] The auction could have proceeded without a legal suit initiated against the respondent. The letter of demand indicating the respondent's default in installment payments would have been sufficient notice for the respondent without the notice of proclamation being served on him. The appellant can proceed with the auction without the need to provide the respondent such notice.

[23] In any event it was wrong for the learned trial judge to find that the notice of proclamation was not served on the respondent. It was left in the respondent's letter box at the property and at the property's management office. The proclamation was also advertised in the Malay Mail.

[24] The respondent admitted he knew about the auction a day before the auction itself but he did nothing to prevent or attend the same.

[25] The appellant had been prudent and acted in good faith in proceeding with the auction. Reasonable care and steps had been taken to notify the respondent of the auction.

[26] The respondent's suggested reserve price of RM3.5 million is without basis as the respondent's own valuer accepted that RM2.8 million is appropriate and there was only one bid at the appellant's reserve price at RM2.1 million. The appellant had been prudent in exercising its right and power of sale by engaging its professional valuer who set the value of the property at RM2.1 million based on fair market value.

[27] There is no evidence from the respondent to show that the appellant committed deliberate and wilfull misconduct or had intended to defraud the respondent in selling the property at RM2.1 million.

[28] The respondent's valuer failed to note appropriate comparable sales in coming to the reserve price. Since this was not done, the reserve price does not reflect the reasonable market value of the property.

Summary Of The Respondent's Contentions

[29] As stated earlier, the respondent in resisting the appellant's appeal, raised a preliminary objection that the appellant was procedurally late by more than two months in filing the additional record of appeal incorporating the learned trial judge's grounds of judgment.

[30] The respondent submitted that the appellant was negligent, acted *mala fide* and committed fraud by not notifying the respondent in sufficient time with regard to the auction. This prevented the respondent to object to or participate in, the auction by offering to buy the property.

[31] The appellant breached the contractual obligation to the respondent in failing to notify about the proclamation and the appellant had caused the alleged loss to the respondent with regard to the property and had prevented an appropriate price to be achieved for the property in the auction.

[32] Alternatively, the appellant has a duty of care in tort to the respondent in a banker and customer relationship. This duty of care was breached as there was no notification given by the appellant to the respondent regarding the proclamation before the auction date.

[33] In respect of this notification, the appellant's solicitors' letter dated 5 January 2015 was sent to the respondent and the latter only received this letter on 13 January 2015, after the auction as stated on 10 January 2015. The said letter was received by the security guard at the property on the same date. The search for the proof of posting also indicated that the letter was sent on 13 January 2015 and only posted on 12 January 2015. This is inconsistent with the requirement of ss. 11.15 (b) and 11.16 of the property purchase agreement and also inconsistent with ss. 15.16(b) and 15.17 of the same. All these sections will be further addressed later in this judgment (parties had used the word "section" in the agreements instead of "clause").

[34] The appellant's witness DW3 also could not show the original posting. Her evidence is not credible when she said proof of original posting is kept by the post office ("Pos Malaysia"). Since no one from Pos Malaysia was called by the appellant to explain proof of the original posting, adverse inference should apply against the appellant pursuant to s. 114(g) of the Evidence Act 1950 ("EA").

[35] The auction is a legal process as the signature of a solicitor acting for the appellant can be seen on the proclamation. If it is not a legal process, no signature of the solicitor would be needed for the proclamation and thereafter the auction.

[36] The advertisement of the proclamation by the appellant in the Malay Mail is insufficient as the newspaper is not available throughout Malaysia. The newspaper is not circulated in Perlis, Terengganu, Sabah and Sarawak.

[37] The person who was said by the appellant to have left a copy of the proclamation at the respondent's post box and the management office was never called to testify. This also raises adverse inference against the appellant pursuant to s. 114(g) of the EA.

[38] The appellant's solicitors responsible for serving the relevant documents to the respondent was an agent of the appellant and committed negligence in the process of serving the same.

[39] Although the respondent admitted he knew about the auction a day before the auction date on 10 January 2015, he came to know of the same from a blogger who called him on 9 January 2015. The blogger said his property had been auctioned off on that very date 9 January 2015. He therefore did not attend the auction on the 10 January 2015 and he was not cross-examined on this.

[40] During trial, the appellant repeatedly tried to prove that notice was given regarding the proclamation. In this regard, if the notification is not required to be sent to the respondent, there is no need for the appellant to prove in court that such notification was indeed given to the respondent.

[41] The appellant is being unfair and unreasonable in setting the reserve price at RM2.1 million for the property. The property could have achieved a reasonable value of RM3.5 million in accordance with the respondent's valuation report. Even a comparable sale noted by the respondent's valuer before the auction was more than RM2.1 million.

[42] The appellant had breached an implied contractual term in arriving at the reserve price. This caused a loss to the respondent in not getting an appropriate, fair and reasonable price for the property.

[43] The value of the property should be RM3.5 million as indicated in the respondent's valuation report. Further, the appellant's valuation report is actually written for a different entity, ie, CIMB Bank Bhd and not the appellant. The appellant itself did not have a valuation report and therefore, could not use the valuation report prepared for CIMB Bank Bhd.

[44] The appellant's valuer, DW5 did not visit the property to do the valuation but instead had relied on his staff to prepare the valuation report. This is proof of negligence. He admitted it is not acceptable for a registered valuer not to visit the site for a valuation and only rely on others to come up with the valuation report. DW5 also admitted a mistake in the valuation report. This mistake is with regard to the citing of sales from a neighbouring lot but not from the development itself and hence, the same was not done with reasonable care and skill.

[45] The appellant's valuation report is also wrong as it referred the property as residential when it should have been commercial. This proves negligence and lack in skill in the preparation of the report.

[46] The appellant's witness, DW6 did not visit the comparable properties used in the valuation report. He had only assumed the comparable properties had the same amenities as the property for auction. DW6 also admitted that by mistake, he had not taken into account the market value of the property. Therefore, the market value set by the appellant at RM2.1 million for the auction is wrong.

[47] There was actually no visit and inspection done by the appellant's valuer of the property itself. The valuer did not request for an appointment from the respondent to inspect the property before the valuation report was prepared.

[48] The respondent could sue the appellant in the present action despite not seeking an order to declare the auction invalid. There is no need to set aside the auction that has been completed with the purchase of the property by the two bidders. The acceptance of the surplus proceeds from the forced sale of the property by the respondent also does not mean the respondent could not sue the appellant in the present action. As there was no notice issued by the appellant stopping the suit because of such acceptance, the respondent could still proceed with the action. The acceptance of the surplus proceeds before the suit also does not mean that the present action taken by the respondent was an afterthought.

Our Analysis And Decision

[49] Analysing the oral and written submissions of both parties, essentially the dispute involved identifiable issues. Addressing these issues would effectively and sufficiently dispose of the appeal without saying more than necessary. We are of the opinion these issues can be classified and addressed as follows.

A. Whether The Respondent's Preliminary Objection Should Be Allowed

[50] The respondent's preliminary objection was raised after the additional record of appeal was filed by the appellant incorporating the grounds of judgment of the learned trial judge. The appellant, thereafter, filed a notice of motion to allow for that filing of the additional record of appeal. As indicated earlier, the respondent submitted that this filing of the additional record of appeal was late by more than two months.

[51] We noted the reasons given in the appellant's affidavit supporting the motion. The appellant affirmed that they had to study the lengthy grounds of judgment of the learned trial judge in order to decide whether to amend the memorandum of appeal. The appellant also asserted that they had inserted the grounds of judgment in the additional appeal record and the same had been served on the respondent.

[52] In this regard, we agree with the reasons given by the appellant. In any event, with respect, we could not say that the respondent would in any manner be prejudiced by the filing of this additional record of appeal. The grounds of judgment of the learned trial judge, after all was served on the respondent by this additional record of appeal, well before the hearing of the appeal. Therefore, the respondent had more than sufficient time to prepare for the appeal.

[53] Hence, we are of the considered opinion that the preliminary objection should be dismissed and the motion should be allowed.

B. Whether The Learned Trial Judge Had Descended Into The Arena

[54] When a trial judge acted in a manner more than an impartial arbiter should in any given case, favouring unjustifiably a particular party, there is a disturbing likelihood that the arguments of the opposing side were no longer before the court for due consideration. The opposing party may well feel that justice would not be achieved even before a final decision is pronounced for the case. Increasingly this is known as cases where the learned judge had "descended into the arena". This basically means where the arbiter is so partial in the conduct of hearing the case that, inevitably an accusation could be levelled that the court is inclined towards one party against the other, even when the weakness of the case for the favoured party should be seen as quite glaring. The judge is no longer viewed as an impartial party, hearing the case and arguments of both sides without bias but has turned the august office into one participating actively and constantly interjecting for one side against the other. Metaphorically speaking, the judge is no longer a referee but a player. Cases illustrating judges descending into the arena cover both civil and criminal cases (see *Hong Yik Plastics (M) Sdn Bhd v. Ho Shen Lee (M) Sdn Bhd & Anor* [2020] 4 CLJ 479; [2020] 1 MLJ 743 and *Rahbar Yadollah Fathi v. PP* [2020] 1 LNS 99; [2020] 2 MLJ 737).

[55] However with respect to the appellant's submission on this issue, we do not agree that the trial judge had been partial throughout the course of the trial. Questions posed and statements made by the learned trial judge during the trial do not at all indicate that she had a taken a stand favouring the respondent even before giving the decision. It could not be said that she had conducted the trial with the intention to unnecessarily hinder and frustrate the appellant in presenting its case before the court. Asking the appellant's witness DW5 as pointed out by the appellant whether he is having a problem with hearing could not be equated to the trial judge being partial towards the respondent. The trial judge's mannerism and choice of words could have been better phrased but she certainly could not be accused of not being objective by asking DW5 this question.

[56] Similarly, we do not find it correct for the appellant to argue that the learned trial judge had threatened its witness when she told the witness that she could end up in lock up for referring to, without permission from the court, a document not in the bundle of documents. We would rule that when the learned trial judge said so to the witness, she was merely reminding the witness how serious the court views that reference to the document without first seeking permission from the court.

[57] Besides, the trial judge is an experienced judge who had conducted numerous trials before. It is inappropriate as such to cast aspersion with regard to her handling of the case and most certainly she should not be said to have favoured the respondent in conducting the trial.

[58] On the whole, we do not agree with the appellant that the learned trial judge had acted unfairly towards the appellant in conducting the trial at the High Court. The evidence alluded to by the appellant to our mind does not at all prove that the learned trial judge was partial for the respondent and in any event, we could not find any evidence that is sufficient to hold that she had descended into the arena while conducting the trial.

C. Whether The Appellant Must Notify The Respondent About The Proclamation

[59] In determining this issue, we must first stress the importance of discerning the terms of the property documents ie, the agreements, deed of assignment and the PA. After all, the terms in these documents have been agreed upon by the appellant and the respondent. In this regard, both parties were in *consensus ad idem* regarding the terms of the agreements and had the intention to enter into the same (see Federal Court's case of *Deutsche Bank (Malaysia) Bhd v. MBf Holdings Bhd & Anor* [2015] 8 CLJ 1068; [2015] 6 MLJ 310). This is further supported by the deed of the assignment and the PA. The terms of all these documents do provide that the proclamation was sufficient for the auction to proceed without the same being notified to the respondent.

[60] For the agreements, the relevant provision is s. 10.1 of the property sale agreement and for the deed of assignment, it is s. 5.1(d). In both, it is stipulated that the appellant could sell the property by public auction as an absolute unencumbered owner. And at price and in such manner at the absolute discretion of the appellant free from any interest of the appellant. This gives the appellant wide powers in respect of the auction. Especially so when it clearly states the auction is free from any interest of the respondent. Meaning that there is no interest even for the respondent to be notified of the proclamation. And the respondent absolutely agreed to this term. There is, of course, no dispute of his agreement to this term, otherwise, the respondent would not have executed the agreements.

[61] Similarly, para. 5 of the PA clearly indicates the respondent's agreement for the appellant to deal with the property fully and effectively, including, to sell the property by public auction as the appellant may think fit. Again, such wide power is given to the appellant in respect of the auction.

[62] In all three documents pertaining to the property as shown above, the respondent willingly agreed to hand over the property to the appellant for sale by public auction. The terms of the three documents clearly do not provide for the notification of the intended auction to the respondent. Consequently, there is no duty on the appellant to notify the respondent about the proclamation. The respondent as someone who needed the facility then, chose to ignore or failed to appreciate the repercussions of his agreement on the terms of the three documents as explained above. With respect, he must be bound by his agreement.

[63] It is also most important to note that the property is absolutely assigned to the appellant. Meaning that the appellant has absolute discretion in dealing with the property as it deems necessary. The property basically belongs to the appellant until full payment is made by the respondent for the facility he obtained from the former. Once there is default on the repayments of the facility, a bank could immediately act because of the assignment. This is how a bank works in respect of its customers who are provided banking facilities. And this is quite basic for any borrower to be aware of. It has become common knowledge this is how banks operate to bind parties owing money to them because of the facilities granted. Thus, having absolute discretion to deal with the property because of the assignment, there is absolutely no requirement whatsoever for the appellant to notify the respondent regarding the proclamation. In fact, because of the absolute assignment, no notices and demands need to be further given as indicated in the case of *Ruzain Zainudin & Anor v. RHB Bank Bhd* [2011] 1 LNS 1196; [2012] 3 MLJ 401 where it is said as follows:

> Based on the finding above that the defendant was entitled to proceed based on the deed of assignment, the court finds that the issues raised by the plaintiffs as regards whether the defendant should have issued a letter of demand, a notice of termination or a notis penamatan to be a

non-starter. It is the court's finding that there under the deed of assignment, the defendant was entitled to proceed to auction off the property in the event of a default, and this had clearly occurred in this case.

[64] Besides, there is no need for the notification of the proclamation for a LACA sale as decided by the Federal Court in *Damai Freight (M) Sdn Bhd v. Affin Bank Bhd* [2015] 4 CLJ 1 where it is held as follows:

> It should be noted that the entitlement and power of the bank to exercise its rights to sell the lease over the land in the event of the appellant's default are clearly provided for under cls. 9 and 11 of the LACA. Clause 9 sets out the events of default upon which the bank is entitled to recover the sums of money owed under the LACA and to exercise the rights and powers provided thereunder by law **without any previous notice to or concurrence on the part of the appellant**.
>
> (emphasis added)

[65] A relevant case on the point that a proclamation need not be served but not cited by both parties in the present appeal is the case of *Public Bank Bhd v. Kemajuan Flora Sdn Bhd & Anor* [2001] 1 LNS 330; [2001] MLJU 467 where Ahmad Maarop JC (later PCA) said as follows:

> ... Section 2581(b) of the NLC does not require the proclamation of sale to be served on the defendant. No other provision in the NLC or any law requiring the proclamation of sale to be served on the defendant had been identified. So I do not see how it could be established that the non-service of the proclamation of sale (if proven) would constitute a breach of a statutory provision.

[66] Since the respondent need not be notified of the proclamation, the appellant could not be found negligent, had not acted *mala fide* and had not committed fraud even if the appellant had not informed the respondent with regard to the auction. The appellant also could not have breached its contractual obligation to the respondent in failing to notify about the proclamation and consequently, the appellant could not have caused the purported loss to the respondent with regard to the sale of the property *via* public auction.

[67] Further, contrary to the submission of the respondent, the appellant has no duty of care in tort to the respondent to notify him of the proclamation before the auction date. This purported duty of care under tort could not possibly arise because of the terms already agreed by the respondent as highlighted above. A purported duty under tort could not arise when there is agreement under contract. This is illustrated in a case of the Privy Council, which was again not cited by the parties in the present appeal although this case is relevant on the same point as we mentioned. The case is *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd* [1985] 2 All ER 947, [1986] AC 80. Giving the advice of the Privy Council, Lord Scarman said:

> Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship.

D. Whether The Letters Sent By The Appellant Notifying The Respondent About The Proclamation Are Relevant In View Of The Terms In The Property Documents

[68] As explained, the terms in the three property documents ie, agreements, deed of assignment and PA, all indicate the willingness of the respondent to entrust the property to the appellant in a normal banking transaction. And as elaborated too, these terms are quite clear in its application. Therefore, it does not matter whether there was correspondence sent to notify the respondent about the proclamation. Even if the letters were sent, this could not in any way override the terms of the property documents. The terms, as already explained, do not provide for such notification. Therefore, at best, the letters sent were extra or additional service provided at the courtesy of the appellant as a bank to the respondent, being its customer. It was sent beyond the duty imposed on the appellant. After all, such letters if accepted correctly and in the right spirit, are for the benefit of both parties; the bank not needing to take further and more severe action, while the customer being able to settle the outstanding amount due without paying more costs. Hence, it is with respect futile for the appellant to argue that the letters sent showed such notification is needed regarding the proclamation. It also renders the respondent's submission that the letters came after the auction as pointless, even if it true. This is because by the very terms of the property documents, as explained, there is indeed no requirement for the respondent to be notified of the proclamation.

E. Whether Specific Provisions Of The Property Purchase Agreement Apply To The Respondent In Respect Of The Auction

[69] As pointed out, the respondent submitted that the letters attempting to notify him of the proclamation are not consistent with specific provisions of the property purchase agreement, namely, ss. 11.15(b), 11.16, 15.16(b) and 15.17.

[70] Section 11.15(b) above speaks of service of letters being effective only after three working days upon posting. As indicated earlier, the respondent submitted the letter informing of the proclamation was posted only on 12 January 2015. Therefore, having regard to this section, the service of the letter would only be effective on 15 January 2015, which is after the auction on 10 January 2015.

[71] While s. 11.16 above is about service of any legal process that may be effected by prepaid registered post and such legal process shall be deemed to be served five days after the date of posting, the respondent argued since

the letter was posted on 12 January 2015, that legal process was served only on 17 January 2015. Again, this would mean that the legal process was served after the date of auction, 10 January 2015.

[72] In respect of s. 15.16(b) above, this term provides, *inter alia*, that service by post is deemed received only on the third business day after posting. Again, since the letter was posted only on 12 January 2015, the same was only received on 15 January 2015, which is after the auction date on 10 January 2015.

[73] Lastly, with regard to s. 15.17 of the property purchase agreement, this term stipulates the requirement of five days after posting for the service to be effective. Again, since the letter was posted only on 12 January 2015, by virtue of this term, the same was only effectively served or received on 17 January 2015, which is also after the auction date on 10 January 2015.

[74] These sections are being referred to by the respondent to impress upon us that in any event, the letters sent informing him about the proclamation, even if received, could not be taken into account as the service of the letters would be considered good only after the auction date, 10 January 2015. Consequently, it was too late for the respondent to either object or participate in that auction. This has resulted in the loss to respondent in respect of the auction.

[75] In the first place, all of the above sections could be argued in the manner as done by the respondent only if there is a duty to inform the respondent regarding the proclamation of sale. But, unfortunately, we have already explained there is absolutely no obligation for the appellant to so notify the respondent. Hence, those sections or terms of the property purchase agreement could not override s. 10.1 of the property sale agreement, s. 5.1 of the deed of assignment and para. 5 of the PA, which we have adverted to in respect of at issue "C" above.

[76] The learned trial judge had also correctly found that the sections of the property purchase agreement that the respondent wants to use here, only referred to legal process. Meaning these sections are confined to situations where the appellant and respondent elect to sue each other in court. These sections do not apply for an action where nothing is further needed to sue the respondent in a court of law. In proceeding with the auction, the appellant is only exercising a chose *in rem*. This requires no suit in court. In this respect, the following is what the learned trial correctly found:

> I agree with Puan Raiza based on the meaning of "legal process" in Black's Law Dictionary that section 15.17 of the property Sale Agreement (see also section 11.15(b) of the property Purchase Agreement (P11)) are not applicable as the proclamation of sale is not a legal process and that it is merely a notice or communication under or in connection with the property Sale Agreement (P10).

[77] There is also the Federal Court's decision illustrating the right of the appellant to direct sale for LACA cases. This is *Damai Freight (M) Sdn Bhd* (*supra*) where the following is said:

> In the absence of any statutory provision or any express bar in the assignment to that effect, the bank is entitled and could not to be prohibited from exercising its power and rights as stipulated under cls. 9 and 11 of the LACA.

[78] While the Federal Court's case of *Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621 points out the right to realise the property without further court order and where it was held as follows:

> All things considered, we were more inclined to agree with learned counsel for the appellant in particular with his submission that in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realise its security under an absolute assignment of rights to land, the court should give effect to and recognise the contractual rights as determined between the vendor and the purchaser.

[79] Therefore, the submission of the respondent on the sections of the property purchase agreement as alluded to, could not be accepted as these sections are meant only for a court process ie, filing of a suit or similar actions but not in respect of intended sale by way of public auction which is where the appellant is merely exercising its right *in rem*.

[80] Further, with respect, it was incorrect for the respondent to submit the auction is a legal process as the signature of a solicitor acting for the appellant can be seen on the proclamation. Just because the signature of the solicitor is affixed on the proclamation, this does not necessarily mean that the auction is a legal process undertaken by the appellant.

[81] This would also mean it is of no consequence even if no one from Pos Malaysia came to court to testify for the appellant to explain about the posting of the letters. Equally, the advertisement of the proclamation in the Malay Mail which was not circulated in several States counts for nothing as in the first place, there is no need for the appellant to notify the respondent regarding the proclamation.

F. Whether The Appellant's Valuation Report Could Be Used For The Auction

[82] As noted, the appellant's valuation report is being challenged on several fronts. First is the contention that the report was not commissioned by the appellant but by CIMB Bank Bhd. This argument with respect is too trivial as it sought to differentiate essentially the same banking organisation. Of course strictly speaking, these are two different entities. But, in terms of business prudence and efficient management of resources, the instruction for the valuation report can come from the appellant or CIMB Bank Bhd, both

being in the same banking group. And the valuation report is for the purpose of auctioning the property and nothing else. It is not for the purpose of auctioning a property unrelated to the present appeal. The respondent could not be prejudiced just because the report is requested by CIMB Bank Bhd even if this is true, though denied by the appellant. There can be no confusion about which property is being valued to the detriment of the respondent. Besides, the witness for the appellant, DW2, had already explained that the secured collection for both entities is handled by one centre. This indicates how close and related the administration of these entities is.

[83] The allegation by the respondent that the appellant's valuer did not visit the property to prepare the valuation report could not render the report worthless or unworthy of reference. In evaluating a property for the purpose of auction, it is not necessary to always visit the property. What is acceptable in the practice of property valuers is to make comparison with sales around the vicinity of the said property. This can be done by not visiting the property but getting the correct information from such sales of other properties.

[84] In any event, what is most important is for the respondent to prove that the valuation was premised on fraud or improper care. We could not find any evidence of fraud and improper care in the valuation of the property by the appellant. After all there is no logical reason why the appellant would want to suppress the reasonable value of the property. The higher the value, the more beneficial it would be for the appellant as a bank.

[85] In this regard, Edgar Joseph Jr J (as he then was) in *Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd* [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109; [1992] 2 MLJ 504 said as follows:

> Upon the facts in the present case, although it is true that there is a wide disparity in the opinion evidence of the rival experts as to the true market value of the property at the time of the auction sale, it is noteworthy that neither expert has expressed his opinion on the basis of a statutory sale by public auction. **I am not prepared to hold that the sale if it was at an undervalue at all, was at such an undervalue as to indicate fraud or want of proper standards of care as to justify the sale being set aside**.
>
> (emphasis added)

[86] In the case of *Seema Jaya Sdn Bhd & Anor v. CIMB Bank Bhd* [2015] 8 CLJ 1047 our learned sister, SM Komathy Suppiah JC (as Her Ladyship then was) explained as follows:

> *It is clear from the authorities quoted above that disparities in the valuations is not evidence of negligence. A chargor who alleges his property was sold at an undervalue must prove that the undervalue was so gross as to indicate fraud or want of proper standards of care.*
>
> (emphasis added)

[87] The matters noted above would indicate that the auction which is premised on the valuation report by the appellant rightly had proceeded and there is no basis to impugn the same. The market price set by the report at RM2.1 million for the property is also reasonable as proven by the fact that the successful bidders were only willing to pay this price for the property. No bidders had offered more than this price for the property. Therefore, it is unreasonable and with respect wrong for the respondent to demand that the property could be sold off at the very least at the price of RM3.5 million.

[88] Further, the appellant's valuation report setting the market price of the property at RM2.1 million could not simply be challenged by the respondent without cogent reasons. As long as the appellant had engaged qualified persons for the valuation report and was not reckless in setting the market price, such report ought to be accepted. In the Court of Appeal's case of *Malayan Banking Bhd v. Lim Poh Ho & Anor* [1997] 2 CLJ 516; [1997] 1 MLJ 662 it was held as follows:

> (2) The bank had a narrow duty to take reasonable precautions to obtain the true value of the property at the time of sale, and was required to act in good faith, but unless there was evidence of deliberate or wilful misconduct on the part of the bank, the "duty to take reasonable precautions" would not be extended to cover every possible step an altruistic financier could have taken regardless of time, cost or effort ...
>
> (3) The true commercial value of a property was not what a valuer thought it should be, but the actual price that the property would fetch on the open market, and hence the sale price of RM56,000 was the true market value because no impartial buyer was willing to pay more for the property ...
>
> Items (2) and (3) of the particulars of negligence was proven to be groundless because the bank had led evidence to show that it had taken advice from qualified persons before it set the reserve price at each of the public auctions held. Item (4) of the particulars of negligence was shown to be groundless because firstly, the loan agreement imposed no contractual duty upon the bank to notify the borrowers of the sale, and secondly, the first respondent's evidence on oath was to the effect that he knew that he had defaulted and that the bank had put the property up for auction, and he did nothing about bidding himself at the auction or doing anything whatsoever to get a better price himself ...

[89] Further, the learned trial judge with respect should have accepted that the appellant's valuation report as the property was residential in nature, located in mixed development land having a commercial title. It is not purely a commercial property. The property after all, a penthouse, was being valued in comparison with similar residential properties with the usual amenities.

[90] In any event, valuation of a property could not at all times be exact and precise to the dot. The exercise is one where there would be difference of opinions and conclusions. It is not an exact science. In this regard, the Court of Appeal's case of *Jitender Singh Pagar Singh & Ors v. Pentadbir Tanah Wilayah Persekutuan & Another Appeal* [2012] 2 CLJ 165 states as follows:

> Valuation of land clearly is not a mathematical process. In particular, potential development value is not often easy to determine in the absence of an abundance of evidence from recent transactions in respect of comparable properties. Almost invariably there emerges from the consideration of all of the facts a fairly well-defined range, sometimes blurred at either end within which the answer must lie. The opinion of those of equal competence and experience may well tend to indicate different point within that range. Ultimately, it is a matter of opinion and experience. Thus, the requirement that the amount of compensation to be awarded is to be based on an opinion given by the experts in this particular field (ie, a valuer), in determining the market value of the land that had been acquired and the amount of compensation to be awarded in our view is well founded.

[91] Our learned brother, Che Mohd Ruzima Ghazali JC (now JCA) in the case of *Ng Bak Soon & Ors v. Ji Seng Hong Plastic Manufacturing Sdn Bhd; Mustapha Mohamed (Receiver & Manager And Applicant)* [2015] 2 CLJ 828; [2014] 11 MLJ 793 said:

> There are various method of valuation and what was tendered in court by the applicant is one of it. I cannot say that that valuation is defective unless it can be shown that the method used is totally wrong and against the basic principles of valuation. The petitioners failed to do so.
>
> I also agree that the opinion given by a valuer as regard to the valuation of the assets is merely a guide to the applicant ...

[92] In addition, the learned trial judge too erred in accepting the respondent's valuation report. This is because PW1, the respondent's valuer clearly admitted in court that the valuation report was not prepared for foreclosure proceedings. Since it is not meant for foreclosure, it could not be used for the sale of the property by auction. Therefore, the respondent's valuation report should not have been accepted.

G. Whether The Respondent Could Still Maintain The Case Since The Bidders Have Been Given Vacant Possession

[93] There is no doubt the respondent settled the suit with the bidders by entering into a consent judgment with the latter. In this consent judgment, the respondent agreed to give vacant possession of the property to the bidders. That essentially meant that the auction is accepted by the respondent to be lawful. Otherwise the respondent would not have agreed to give vacant possession of the property to the bidders.

[94] Since the respondent accepted that the auction was proper and valid, he should not then continue the suit against the appellant. He should not be allowed to approbate and reprobate. In the Court of Appeal's case of *Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd v. Liew Choong Kin* [2018] 6 CLJ 217; [2018] 3 MLJ 354 it is said as follows:

> Based on the above actual facts, the respondent could be said to be taking a different stance before the court in this action and under the law he was not allowed to blow hot and cold in the attitude that he adopts. The learned judge failed to consider that the respondent's claim for trespass and the claim he had already made at the second enquiry arose from the same facts. He should accordingly be estopped from commencing this action. The respondent having made a choice at the second enquiry could be treated as having made an election from which position he should not be allowed to abandon. He had taken a benefit arising out of the course of conduct which he had pursued earlier and with which his subsequent conduct was inconsistent with his election. The respondent should not be at liberty to approbate and reprobate having taken a particular position. Reference in this connection could be made to the decision of this court in *Kelana Megah Development Sdn Bhd v. Kerajaan Negeri Johor And Another Appeal* [2016] 8 CLJ 804; [2018] 3 MLJ 354 at 369; [2016] MLJU 1649; wherein it was held at p 814 (emphasis added to highlight the similarities):
>
> > [20] The appellant's conduct as described hereinbefore is plainly inconsistent and contradictory. The alleged rights pursued and relief sought through the present action are remarkably inconsistent with and contradict the right pursued and relief sought in the land references. ... The appellant's conduct, as it were, could thus be properly described as blowing hot and cold that while the appellant approved the acquisitions they also rejected it. The appellant is not permitted to approbate and reprobate on the issue of the acquisition of the seven plots of land.

Conclusion

[95] We are of the opinion that there are more than sufficient merits for us to exercise appellate intervention in the present appeal. Based on all the reasons that have been explained as aforesaid, we are unanimous in allowing the appeal.

[96] Accordingly the decision of the High Court is set aside with costs for the appellant.